(16972.)

Supreme Court of the United States.

SAMUEL H. STONE, AUDITOR, ET AL., *Appellants*,
vs.
DEPOSIT BANK OF FRANKFORT.

BRIEF FOR DEPOSIT BANK OF FRANKFORT.

The following facts alleged in the bill of complaint in this case are not disputed:

The appellee, Deposit Bank of Frankfort, was created a body-corporate and politic by an act of the General Assembly of the Commonwealth of Kentucky, approved March 3rd, 1863, and was thereby authorized to transact the general business of a bank in the city of Frankfort for a period of twenty years from that date. The bank was organized under its charter in 1867, and has continuously, since then, been transacting the banking business.

By the general laws in force in the State of Kentucky in the year 1863, and continuously thereafter, until March 8th, 1871, banks doing business in the State were required to pay to the State 50 cents on each $100 worth of capital stock of each bank; and, by an amendment to this bank's charter, on March 8th, 1871, it was provided that the tax or bonus then paid by the bank should, in the future, be in full of all taxation, except city taxes, on real estate owned by it. The tax or bonus

referred to was the 50 cents on each $100 of its capital stock required by the general law to be paid by all the banks in Kentucky.

By another act of the General Assembly of Kentucky, approved February 23d, 1882, all the privileges and franchises granted to said bank under the act of March, 1863, as amended by the act of March 8th, 1871, were extended and continued in force for a period of twenty years from February 23d, 1882.

This bank paid each year the taxes required by its charter, 50 cents on each $100 worth of its capital stock, up to and including July 1, 1886, since which date it has paid 75 cents on each $100 worth of its stock under its contract under the Hewitt Bill hereinafter referred to.

By the settled course of the decisions of the Court of Appeals of the State of Kentucky, which is the highest court in said State, the meaning and effect of the aforesaid provision of this bank's charter has been fixed and determined.

By a decision of that court, rendered June 5th, 1888, the judgment of the Franklin Common Pleas Court was affirmed, by which judgment the said court decided that the Commonwealth could not tax this bank at a greater rate than 50 cents on each $100 of the value of its stock, which included all taxation of all kinds, State, county and city, city taxes on real estate owned by it alone excepted. That suit was a proceeding by the county of Franklin against this bank to assess its property for county taxation and to compel the bank to pay county taxes under authority of an act of the Legislature, approved March 18th, 1876, entitled "An act to make taxation equal and uniform in counties where an ad valorem tax is levied by the court."

This attempt to make the bank pay county taxes was by distraint upon its property, and the bank filed a bill in equity in the said Common Pleas Court against the county and its sheriff, enjoining and restraining the collection of any tax from it upon the ground that the bank was exempt from such taxation by

the aforesaid charter amendments, and it was alleged that the said act of 1876 was void in so far as it attempted to repeal or impair the said exemptions, and the county and its said sheriff were duly brought before the court, and upon full hearing, the said Common Pleas Court rendered a judgment exonerating the bank from the payment of the tax and awarded the injunction prayed for. The county appealed from that judgment to the Court of Appeals, where the said judgment was affirmed. The entire record of that suit is filed with the bill and is marked Exhibit A, and may be found on page 12 of this record.

By another act of the Legislature of Kentucky, approved May 7th, 1886, and known as the "Hewitt Bill," it was provided that cashiers of all banks in the State should annually, thereafter, on the first day of July of each year, make a report of the condition of the bank to the Auditor of Public Accounts, and should pay into the State Treasury 75 cents on each $100 of the capital stock of the bank, and should, in addition, pay into the said treasury on their surplus, undivided profits and undivided accumulations, in excess of 10 per cent. of their capital stock, the same rate of taxation as was paid on real property; and it was provided that such payment should be in full of all tax, State, county and municipal, except that the real estate owned by the banks and used in conducting their business, should be liable for county and municipal taxes, and the following condition was annexed upon which any bank was to be entitled to such exemption, to wit:

> "That each of said banks, institutions and corporations, by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all rights under acts of Congress or under the charters of the State banks to a different mode, or a smaller rate of taxation, which consent or agreement, to and with the State of Kentucky,

shall be evidenced by writing under the seal of each bank and delivered to the Governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such banks."

This bank complied fully with the condition above stated and did give its consent in writing to the levying the tax, and did agree to pay the same and to release all rights it had under its charter to a different mode or smaller rate of taxation. See page 4 of this record.

The bank insists that by its acceptance of the terms of the said "Hewitt Bill," it has an irrevocable contract, by the terms of which the bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of the bank.

The bank continued to pay annually the amount of tax due from it under this act, on the 1st day of July in each year, up to and including July, 1893, on which date the Auditor of Public Accounts refused to receive the tax under the said "Hewitt Bill," basing his refusal upon the act of the Legislature of Kentucky, passed in 1892, which act it was claimed repealed the aforesaid "Hewitt Bill."

By article 3 of that act it is provided, in substance, that every bank, in addition to other taxes imposed upon it by law, shall pay taxes upon its franchise to the State, and local taxes thereon to the county, State, town or taxing district where its franchise may be exercised. And the Auditor, Treasurer and Secretary of State are, by the act, constituted a board of valuation and assessment for fixing the value of said franchises. This board is authorized to fix the value of the capital stock of the bank and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the State and in the county where situated, and the remainder thus found is

to be the value of the corporate franchise subject to taxation in said act, and this value is to be apportioned by the board upon the several taxing jurisdictions entitled to collect the taxes. It is made the duty of the Auditor to certify to the County Clerk of the counties where any portion of the corporate franchise of the banks shall be liable for any local taxation, the amount thereof for county and State taxes, and the collecting officer for county and State is then directed to collect the taxes.

It is further provided that, in event the banks fail to make such report and to pay such taxes, a penalty of 10 per cent. shall attach upon the tax, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum, and any bank failing to pay its tax, penalty and interest, after becoming delinquent, is to be deemed guilty of a misdemeanor, and, upon conviction, is to be fined for each day it remains unpaid.

The amount of tax which this bank would be required to pay under this act of 1892 is very largely in excess of the amount it was required to pay by its contract under the Hewitt law, and it is alleged that said act of 1892 violates the Constitution of the United States, and particularly the clause thereof which prohibits any State from passing a law impairing the obligation of contracts.

It is also charged in the bill that the aforesaid method of taxation violates the Constitution of the State of Kentucky, which provides that the General Assembly shall not impose taxes for the purposes of any county, city or town, but may, by general laws, confer upon the proper authorities thereof respectively the power to assess and collect such taxes, and it violates said Constitution in that the said law provided for the assessment of the capital stock of corporations by a State board of valuation and assessment, and provides for the certification of such value by the said board to counties and municipalities where any such stock is situated or franchise employed, giving the said board the right to apportion same

among the taxing districts,and provided that said corporations shall pay to the local taxing districts, local taxes thereon.

The county of Franklin and the city of Frankfort atempted to collect taxes from this bank under the valuation of its capital stock and franchise made by the said State board for the year 1893, and this bank instituted suit in the Franklin Circuit Court against the said county and its sheriff, claiming the benefit of its said contract under the Hewitt law, and prayed the court to establish the same and enjoin the county and its sheriff from attempting to collect any tax contrary thereto.

That court rendered a judgment against the bank, which judgment was appealed by the bank to the Court of Appeals of Kentucky, which reversed the said judgment of the Circuit Court and upheld the bank's contract and ordered a judgment be entered in the Circuit Court in conformity with its mandate, and the judgment was so entered and a copy thereof is filed with the bill, as Exhibit B, and the same is set out in full on page 8 of the record.

The city of Frankfort filed its suit against the bank in which it sought to collect taxes upon the banks franchise in the years 1892-3-4, as assessed by the said board, and defense was made to that suit by the bank that it was exempt from such tax by its aforesaid contract under the Hewitt law.

The issues were made by the pleadings upon that proposition, and as a suit by the bank was then pending in the same court against Franklin county, in which exactly the same question was raised, namely, the validity of the said contract under the Hewitt law, it was agreed between the said bank and city that said suit should remain on the docket and abide the decision of the question in the suit against the county, and upon the return of the mandate to the Circuit Court in the county case, judgment was rendered in the said city case in conformity with the opinion of the Court of Appeals, sustaining the bank's said contract, a copy of which judgment is filed and copied on page 9 of the record.

It is alleged that by the aforesaid proceedings it has been finally and fully adjudicated, that the bank's said contract is valid and enforcible, and that no greater tax can be collected from it than thus provided for in the said Hewitt law.

It is further charged that the appellants were threatening to value the franchise of the bank under the act of 1892 for the years 1894-5-6-7 and to certify such value to the county clerk of Franklin county, to be placed in the hands of the county and city collecting officers for collection, all of which was in violation of the bank's contract and would cause a cloud upon the bank's franchise, and would cause a multiplicity of suits, and damage it in a way that could not be repaired or estimated at law, and that the bank has no remedy at law against such threatened wrongs, and the bank prayed that the appellants should be perpetually enjoined from valuing its said franchise or capital stock for taxation and from certifying the same to the county or city for taxation.

This suit, together with the suit of the Farmers Bank of Kentucky and the Bank of Kentucky, and a number of other banks in Louisville, which had brought similar suits in the same court, was heard in May, 1897, by Circuit Justice Harlan and Circuit Judges Taft and Lurton, at Nashville, upon motion of the banks for an interlocutory injunction and upon the demurrers of the defendants to the bill. The defendants (appellants here) also filed a plea to the jurisdiction of the court and an answer, but the case was heard upon the said motion and demurrer only. See pages 59 and 71 of record.

On June 25th, 1898, the demurrer and the plea of the defendants were both overruled, and thereupon the bank filed its replication to the answer of the defendants. And thereupon, by consent, the cause was submitted for final decree, and the judgment appealed from was rendered by the court. See page 63 of record.

The courts elected one each of the banks representing the several classes of questions to be passed upon, and rendered its

opinion at length in the cases of the banks selected and merely referred in the opinion in suit of each separate bank, to the particular class it belonged to. The questions presented by the bill of this bank were disposed of by the opinion of the court in the case of the Bank of Kentucky, on page 65 of record. The opinion in this case may be found on page 114 of the record, and reads as follows:

> "Taft, Circuit Judge, delivered the opinion of the court: In an injunction suit brought by the Deposit Bank of Frankfort against the county of Franklin, in the Franklin Circuit Court, to prevent the collection of any taxes under the revenue act of 1892, in excess of those imposed by the Hewitt act, it was expressly adjudged on appeal, by the Court of Appeals that the bank had, by its due acceptance of the terms of the Hewitt act, an irrevocable contract of exemption from taxation in excess of that imposed by the Hewitt act, and that the revenue act of 1892 violated this contract. In a similar injunction suit brought by the bank against the city of Frankfort, a decree, in all respect similar, was entered on the same ground. In accordance with our decision, in the case of Bank of Kentucky against Stone, just decided, we must, therefore, grant the motion for a preliminary injunction, and overrule the demurrer to the bill."

By the assignment of errors (page 121) appellants rely, for a reversal, upon the following errors:

1st. That the demurrer to the bill was overruled.

2d. That the court overruled their plea to the jurisdiction.

3d. That the city's offer to file an amended answer June 25th, 1898, was refused.

4th. That the pleas of res judicata were allowed.

5th. That the injunction prayed for was granted.

We take it that the substantial errors indicated in the assignment, are, first, as to jurisdiction; second, the plea of res judicata; and, third, the pendency of an appeal in the Court of Appeals, from the judgment in the city case.

The two first propositions were argued at great length upon the hearing in the lower court, and are so ably and exhaustively considered in the opinion rendered by Judge Taft, that we refer this court to that opinion (page 71 of the record) as the strongest and clearest statement of the law on those two points. (As before stated in this brief, the opinion in Bank of Kentucky case, page 71, was made to apply to this case. See page 114.)

We feel incompetent to add anything to the arguments of the learned judge, in support of the conclusions reached by him, in favor of the jurisdiction, and the pleas of res judicata.

PENDENCY OF APPEAL IN COURT OF APPEALS.

This point arises upon the refusal of the Circuit Court to permit the city to file an amended answer in which it is alleged that it has taken an appeal from the judgment of February 1st, 1896, which is relied on in the bill as res judicata, which appeal is still pending. But that amendment was properly refused, because it did not state a fact bearing on the issue. It did not allege that the judgment had been reversed, which is the only averment that would present the estoppel resulting from it. And being an agreed judgment, and entered in compliance with the opinion of the Court of Appeals, it is difficult to see how it can be reversed.

No question is better settled than that any judgment of a court of competent jurisdiction, is binding upon the parties to it, and their privies until reversed.

State v. Neuer, 9 Pet., 8; Cock v. Halsy, 16 Pet., 75; Huff v. Hutchinson, 14 Howard, 586; Bryan v. Kenut, 113 U. S., 179; Parkhurst v. Burdell, 6 Am. St. Rep., 384.

But upon this point we are not left to general principles of the law, the Kentucky Statutes settles it conclusively, and in very few words. This is the provision of the Kentucky Code of Practice on that subject:

"Section 747. An appeal shall not stay proceedings on a judgment, unless a supersedeas is issued."

No supersedeas has been issued in this case, and the judgment is, therefore, wholly unaffected by the appeal. But a supersedeas would only have prevented the issue of execution upon the judgment, and would not, in any manner have prevented the estoppel resulting "from the thing adjudged."

See Parkhurst v. Burdell, 6 American State Reports, 384; Ellis v. Clark, 19 Arkansas, 420; 70 American State Reports, 603; Todlock v. Accles, 20 Texas, 782; 73 American Decision, 213; Nill v. Cunpunt, 16 Indiana, 107; 79 American Decision, 411; Bank of N. A. v. Wheller, 28 Connecticut, 433; 73 American Decision, 683; Taler v. Hovey, 117 Massachusetts, 108, and Bigelow on Estoppel, 287.

Third. As to judgment being void because it enjoins the city from collecting taxes from the bank.

We do not think the assignment of errors is sufficiently definite to entitle appellants to an examination of this question, but the following facts exhibited in the record, are submitted, for the convenience of the court if it shall decide that the point is within the assignments of errors.

The suit in which the judgment was rendered, was a petition in equity by the city against the bank, in which the claim for taxes is briefly stated with a prayer for judgment for the amount of the taxes and penalites (record page 44).

The answer of the bank (page 46) is in two paragraphs, in one of which it denies the alleged indebtedness, and in the other it sets out at length its claim to exemption from payment of the taxes sued for by reason of its contract under the "Hewitt Bill," and concludes with the prayer for relief as follows:

"Wherefore, the defendant prays that the petition be dismissed; that the defendant's contract under the Hewitt Bill be sustained and declared valid and binding by the court;

that the plaintiff be enjoined and restrained from assessing or attempting to assess, and from collecting or attempting to collect from the defendant any tax upon the defendant's property or franchise, except upon any real estate defendant may hereafter acquire, if any, and it prays for costs and all other proper relief."

No demurrer or reply was filed to this answer by the city, and no objection was made in any manner to the relief asked, and under the rules of pleading laid down in the Kentucky Code of Practice, the bank was entitled, as a matter of right to the judgment it had prayed for. And, independent of the agreement, the court would have given it, as it did, in the exact terms of the prayer.

It is wholly immaterial that no formal grounds for an interlocutory injunction were stated, as no such injunction was asked, but only as part of the final relief, and even if the injunction should be held to be unauthorized (which is the sole contention of appellants), the judgment sustaining the contract under the "Hewitt Bill"—the real thing adjudged, and the basis of the estoppel—would be as effectual here, as if no injunction had been included in its terms.

All these questions as to the validity of the judgment, are wholly foreign to this appeal, since they amount to no more than a collateral attack upon it, which this court will not consider. Such questions may be raised upon the appeal to the Court of Appeals, but not here.

But the judgments are copied below, in order that the court may the more readily examine them together, if it shall decide to pass upon the facts themselves. They are found on pages 43 and 51 of the record, and read as follows:

(Pages 43 and 44.)

FRANKLIN CIRCUIT COURT.

February 1, 1896.

"Deposit Bank of Frankfort
"versus
"Franklin County, &c. } Judgment.

"The plaintiff having heretofore filed a notice accepted by the defendant's attorney, together with the mandate and opinion of the Court of Appeals in this action, and the defendants by their attorneys waiving the filing of said mandate in the clerk's office as required by law, and consenting to the submission of the case for judgment at this time, it is now ordered and adjudged in accordance with the mandate and opinion of the said court in this action, that article 2, of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17th, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter can not alter or change without the consent of the former; by the terms of which contract the plaintiff can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present Constitution of this State and of the act of November 11, 1892 (article 3, chapter 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except its real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had, and has no authority in law to assess or value the plaintiff's franchise for taxation, or the Auditor to apportion or certify the same or any part of the same,

for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of this action be, and the same is now, hereby made perpetual, and the defendants, and each of them, are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise or property of the plaintiff, except upon its real estate.

"And it is further adjudged that the plaintiff recover of the defendants its costs in this action expended.

"To all of which the county of Franklin excepts and prays an appeal to the Court of Appeals, which is granted.

(Pages 51 and 52.)

FRANKLIN CIRCUIT COURT.

February 1st, 1896.

"Board of Councilmen of the city of Frankfort, Plaintiff,
"versus
"Deposit Bank of Frankfort, Defendant. } Judgment.

"It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the Court of Appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the county of Franklin, &c., were defendants, and in the other the Commonwealth, for the use of said county, was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the Court of Appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the Court of Appeals filed in said two cases, that the Court of Appeals has sustained

the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt Bill, which is the same contract relied on as a defense in this case; it is now ordered and adjudged that article 2 of the act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17th, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth, which the latter can not alter or change without the consent of the former; by the terms of which contract the defendant can not, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present Constitution of this State and of the act of November 11th, 1892 (article 3, chapter 103, Acts 1891-2-3), in so far as they were intended to provide for any assessment or taxation of the defendant's property, rights of property or franchise except its said real estate, are in violation of, and repugnant to, the Federal Constitution and void; that the board of valuation and assessment, provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the Auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action, be, and the same is now hereby, granted, and that the defendants be, and each of them are, perpetually enjoined and restrained from levying upon, or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate; and it is further adjudged that the defendant recover of the plaintiff its costs in this action expended. To all of which the Board of Councilmen of the city of Frankfort, except and pray for an appeal to the Court of Appeals, which is granted."

These judgments are set out in full in the bill, and there relied on, as a complete estoppel against the claims of the appellants, county and city, and certified copies of the entire proceedings in the suits in which said judgments were rendered, are filed with the bill, and appear in this record as Exhibit "B," on pages 31 to 42, Exhibit "C." pages 43 and 44, and Exhibit "D," pages 44 to 52.

No appeal has been prosecuted from the judgment in the case of Franklin county, although an exception was taken and an appeal granted, *but the two years within which the appeal might have been prosecuted have elapsed, and none can now be prosecuted.*

The agreed facts recited in the judgment (page 5), are, that there were two other suits then pending in the same court against this bank by the county of Franklin and its officers for the purpose of collecting taxes from the bank; that the defense to those suits relied on by the bank was that it had a contract exemption under the Hewitt law, which was the same defense relied on by the bank in its answer to the city suit; that the two county cases had been appealed to the Court of Appeals; that the suit of the city should stand upon the answer filed by the bank until the decision by the Court of Appeals in the county case, and the liability of the bank to the taxes claimed in the city suit should be settled and determined by the decision of the Court of Appeals, the defense relied on by the bank being exactly the same in all three cases; and "*it appearing to the court by the mandates and opinions of the Court of Appeals filed in said two cases that the Court of Appeals had sustained the defense set up and relied upon by the bank in said two cases, based upon the contract under the Hewitt bill,*" the judgment was rendered in the exact words of the judgment in the county case.

That the agreement was made, is *conclusively* shown by the judgment itself, and it is not to be supposed that this court will

consider for a moment any attack that may be made in this collateral proceeding upon the validity of that judgment.

But the agreement was a most reasonable one, in any view that could be taken of it. Two appeals were then pending in the Court of Appeals, upon precisely the same question, conducted on both sides by the same counsel, and it was for the greater convenience of the court, and counsel, and to avoid unnecessary costs, that the agreement was made to allow the third case to stand on the docket of the Circuit Court, to be there decided exactly as it would have been had it gone to the Court of Appeals.

It will be noticed that the suit of the city was filed August 22d, 1894 (record, page 44), and that the bank's demurrer to that petition was overruled September 23d, 1894, on which date the answer was filed, and no step was taken, or order made in the case until February 1st, 1896, when the judgment complained of was rendered. No demurrer or other pleading was ever filed to the answer of the bank, although the suit remained on the docket from September, 1894, to February, 1896. What more persuasive evidence could be produced in support of the agreement between counsel, recited in the judgment.

HEWITT BILL.

We think it has been clearly shown that as to this bank, the judgments relied on, establish conclusively its contract under the "Hewitt Bill," and it is not thought necessary to argue that proposition independently of the adjudications as it will be very fully and ably argued by counsel for several of the banks where cases are heard with this one, and which have no pleas of *res judicata*.

An affirmance of the judgment appealed from is respectfully asked.

FRANK CHINN,
Counsel for Deposit Bank of Frankfort.